UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN THE MATTER OF THE TRUSTEESHIP CREATED BY AMERICAN HOME MORTGAGE INVESTMENT TRUST 2005-2 related to the issuance of Mortgage-Backed Notes pursuant to an Indenture dated as of October 1, 2007,

14 Civ. 2494 AKH

WELLS FARGO BANK, N.A.,

Petitioner,

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July 11, 2014
2:45 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

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(Trial resumes)

(In open court)

THE COURT: Good afternoon, all. Be seated, please.

This proceeding is the result of a bifurcation. I am focusing on the trustee's request for guidance and instructions how to apply the trustee's obligation with regard to allocation of losses to various categories of security. There are various counterclaims and cross-claims as well to which I'll turn at the conclusion of my remarks today.

The findings of fact and the conclusions of law are lengthy. Rather than hold up everything today, burden the Court Reporter, I will deliver a summary, with the idea, which I hope is realistic, to file the complete findings of fact and conclusions of law within a week. That will be my decision. This is, in effect, an advance praecipe of it.

In June 2005, American Home Mortgage Investment Trust, 2005-2 issued a series of notes valued at $5.8 billion, secured by residential home mortgage loans. The notes were divided into 26 classes, with different classes having different rates of interest, different rights to payment, and different measures of seniority.

In the event that the trust suffered losses or failed to generate sufficient income to cover all the various classes in the variety of priorities, the underlying agreements treated the classes in a waterfall effect. In other words, if the

trust was unable to make all promised interest and principal payments, the holders of junior notes would stop receiving payments before payments to the holders of more serious notes.

We focus in the proceedings that came before me, classes of notes labeled 1-A-1, 1-A-2 and 1-A-3. The indenture agreement between American Home Mortgage, Wells Fargo Bank and Deutsche Bank, dated June 22, 2005, which governed the allocation of payments to the note-holders allocated losses to 1-A-2 notes and then to 1-A-3 notes, providing in its operative clause, Section 3.38 (a)(ninth), as follows:

"To the extent such realized losses are incurred in respect of the Group I loans, they're allocated to the Class 1-A-2 notes and Class 1-A-3 notes in that order."

Because of an underlying dispute and inconsistency among the terms of the suite of documents that govern the issuance and rights and obligations of note-holders, Wells Fargo has requested instructions regarding the allocation of losses.

Wells Fargo, the petitioner, is a National Banking Association. Its main office is in South Dakota. It functioned as securities administrator for the trust. As such, it is responsible for organizing payments to note-holders and allocating losses to different classes of notes.

Sceptre, a Delaware limited liability company, has its principal place of business in New York. It intervened in this

action as a party in interest. Sceptre is a holder of Class 1-A-2 notes.

Semper also intervened. It is investment manager for a fund having the same name and holds Class 1-A-3 notes. There were four documents in the suite of documents which were issued to investors: A private offering memorandum; a prospectus supplement, dated June 20, 2005; a term sheet; and an indenture agreement.

The offering documents, that is, the private offering memorandum, prospectus supplement and the term sheet, are the documents distributed to potential investors, were inconsistent with the indenture in one material respect:

While Section 3.38 of the indenture provided that losses should be allocated first to the Class 1-A-2 notes and then to the Class 1-A-3 notes, the prospectus and term sheet provided that losses should be allocated first to the Class 1-A-3 notes and then to the Class 1-A-2 notes.

The indenture was created after the offering documents were created. The various drafts of the offering documents and the final version introduced into evidence provided consistently that losses would be attributed to Class 1-A-3 note-holders first and then to Class 1-A-2 note-holders. Each used the following language in the drafting:

"Realized losses will be allocated to the Class 1-A-2 notes and Class 1-A-3 notes in reduction of the note principal

balance thereof, until reduced to zero; provided, however, that any realized losses allocated to the Class 1-A-2 notes and the Class 1-A-3 notes shall be allocated first, to the Class 1-A-3 notes, and second to the Class 1-A-2 notes."

During the drafting process, the language conveying this proposition was changed to eliminate the proviso clause. The drafts provided realized losses will be allocated to the Class 1-A-3 notes and Class 1-A-2 notes in that order, in reduction of the note principal balance thereof, until reduced to zero. The concision of language carrying the same idea made the proposition to be advanced simpler and clearer, in fewer words, without intending to change the substance. The final version will produce the language in more detail, showing the intent.

The initial drafts of the indenture conformed to the initial drafts of the offering documents with the same proviso clause. However, as the changes went forward, the indenture came to be revised to conform or to attempt to conform with the changes in the other documents.

The appropriate draft of the indenture was worked on at 1:11 am on the morning of June 22, 2005 by the lawyers from Thacher Proffitt & Wood, LLP. In making the changes, an error cropped in specifically in a way that 1-A-2 and 1-A-3 were crossed out to accomplish the change. In order to make the language more concise and to follow this sequence of losses, it

was necessary to reverse the order appearing in the clause of the documents.

However, in effecting that change, the strike-out and replacement that was accomplished in the drafts was not carried through into the indenture. There was no explanation why this should be an inconsistency between the indenture and the offering documents that preceded it.

In any event, the final version of the indenture created this inconsistency by failing to be conformed to the offering document. I find that the structure of the transaction indicates that the allocation of the losses described in the indenture was the consequence of a mistake, and I'll carry this indication forward under three categories:

The first, nomenclature. The indenture, in the way it describes the various classes of notes, consistently refers to a lower numbered note as senior to a higher numbered note in respect of loss allocations. Thus Class I-M notes are senior to Class I-M-2 notes, and Class I-M-2 notes are senior to class M-3 notes. Class 1-A-1 notes are the most senior notes, but the sequence between the seniority of 2 and that of 3 has been flipped, so the indenture 3 became more senior to 2 and 2 junior to 3, which was inconsistent with the sequences of the other classes.

With regard to interest rates, I can take judicial notice that in issuance of debentures in comparison of risks,

higher interest rates are provided for securities of greater risk. However, the Class 1-A-2 notes were assigned a lower interest rate than a Class 1-A-3 notes, suggesting that the Class 1-A-3 notes should be ones with greater risk or junior to the Class 1-A-2 notes. The indenture was opposite to that;

Third, with respect to credit enhancement, the final term sheet described the credit enhancement of each set of notes, reflecting the percentage of the total value of the transaction that must suffer losses before those notes will suffer losses. The higher the credit enhancement, the more senior the note. The final term sheet gave a Class 1-A-2 notes a credit enhancement of 17.55 percent, higher than the credit enhancement given to Class 1-A-3 notes of 7.55 percent, thereby suggesting that the 1-A-2 notes were supposed to be more senior to the 1-A-3 notes. The indenture became drafted to be inconsistent with this.

No one seems to have noticed the inconsistency between the indenture and the offering documents until the press release was issued by Moody's on or about August 23, 2010. Moody's press release stated that it had corrected the ratings of two tranches of these notes, the Class 1-A-2 and the Class 1-A-3.

It described the condition earlier when the 1-A-3 notes were given a lower classification than 1-A-2 notes. However, Moody's disclosure went on, the pooling and service

agreement which was the indenture reversed that, and the trustee, it said, confirmed that it would follow the terms of the PSA. Moody's stated that its ratings had been adjusted to reflect this change, giving the A-2 notes a lower rating than the A-3 notes.

In August 2011, Intex, another company that advised investors, notified its customers that there was a conflict between the offering documents and the indenture. It offered an ability to model cash flows depending on whether the offering document proved to be correct or the indenture or PSA proved to be correct.

In January 2012 after these notices, Och-Ziff Capital bought 50 million original face value Class 1-A-2 notes from from Credit Agricole, previous holder of the notes at 23.4 percent of their face value. Och-Ziff was aware of the discrepancy when it made its purpose and took that discrepancy into account. It considered the value of the Class 1-A-2 notes as if they were senior to the Class 1-A-3 notes.

It also hypothesizes the situation where the value will be junior, thus creating an upside bend and a downside bend to the investment. Analyzing both upside and downside potential by reason of this inconsistency, Och-Ziff was satisfied with the value of its investment, and in December 2013 bought additional Class 1-A-2 notes. Originally it had purchased 50 million face value, then it bought 20 million face

value. In March 2014, it bought $1 million of face value at prices that varied between 23.4 percent to 42.4 percent, to 44.4 percent.

In June 2013, Och-Ziff created Sceptre as a special purpose vehicle to hold notes. The other beneficiaries of the holding were investors in Och-Ziff. After Sceptre, it purchased 26 million original face value of Class 1-A-3 notes in late September or early October 2012, purchasing done for from the previous holder, Nomura Securities.

Semper's trader, Mr. Peresechensky, testified that on September 27, 2012, he submitted a bid for the Class 1-A-3 notes. Peresechensky claimed he was not aware of the discrepancy between the indenture and the offering documents. He acknowledged, however, that he actually looked at the indenture because he had become aware of a nomenclature abnormality, as he termed it, about the seniority of the Class 1-A-3 and Class 1-A-2 notes.

He testified that after reviewing the indenture and market data, he concluded that the Class 1-A-3 notes were senior to the Class 1-A-2 notes, but in coming to this view, I find he had to consider what he called the nomenclature abnormality; and, thus, was aware of the inconsistency between the terms of the indenture and the terms of the related documents. Semper's bid reflected 47.25 percent of face value, and it was accepted by Nomura the same day.

Peresechensky testified that on September 28th, 2012, after Semper's bid on the notes had been accepted, but before it was final, he learned about the discrepancy from another trader, Ali Haghighat. He learned that the discrepancy, about this discrepancy because Peresechensky had attempted to sell Class 1-A-3 notes to Haghighat on that same day of September 28, 2012, and Haghighat agreed to buy at a price higher than Semper had paid.

But 10 minutes Haghighat retracted his bid because, as he termed it, a problem existed with the 1-A-3 notes. Haghighat told Peresechensky that the Class 1-A-3 notes were junior to the Class 1-A-2 notes and sent Peresechensky some language describing the discrepancy between the indenture and the prospectus.

Peresechensky allowed Haghighat to back out of the deal, claiming it had not been finalized and because he had a good relationship with Haghighat. He did not try to back out of the purchase of the notes, claiming that it was less opportunity to do that because of the passage of a day or so, whereas Haghighat wanted to back out on the same day that he had purchased. However, both trades had actually become effected.

I find that Semper's decision to invest and remain invested was based on an evaluation of what the value of the Class 1-A-3 notes would be if those notes were treated as

senior and what their value would be if they were treated as junior and that the investment decision they made was a knowing evaluation of the benefits and detriments of each position.

In 2011, before either Sceptre or Semper had bought any notes, Wells Fargo had received communications from various holders of Class 1-A-2 notes, requesting that Wells Fargo allocate losses according to the terms of the offering documents rather than the indenture.

In response, Wells Fargo wrote to one holder to explain its position, stating that absent an amendment to the indenture, it would allocate losses to Class 1-A-2 and 1-A-3 as described in the indenture. That is first to 1-A-2 and then to 1-A-3, and would not amend the indenture, they could not amend the indenture without the consent of all affected note-holders. That is what Section 5.07 of the indenture funds. However, Section 9.01 provides the indenture may be modified by a supplemental indenture without the consent of holders to cure any ambiguity, to correct or supplement any provision in that document or any supplemental indenture that may be inconsistent with other provisions in that document or any supplemental condition.

There was also provision for modification with a consent of holders that required a hundred percent. Wells Fargo stated that it would not solicit the consent of other note-holders unless the first note-holder indemnify Wells Fargo

for costs associated with the solicitation.

Various solicitations occurred between Wells Fargo and Och-Ziff. Wells Fargo tried to rescind the solicitation. Semper refused, and eventually on May 10, 2013, Wells Fargo stated that if it could not get a hundred percent consent, it reserved the right, but assumed no obligation to take further action to resolve the inconsistency.

Semper objected to the consent solicitation and requested Wells Fargo that it reconfirm that losses would be allocated first to Class 1-A-2 and then to 1-A-3.

On January 17th, 2013, Wells Fargo began this case by filing a petition in Minnesota District Court, 4th Judicial District, Hennepin County, asking for an order of the Court regarding the proper allocation of losses between the Class 1-A-2 and 1-A-3 note-holders. In both Minnesota Statute 501B.16, Wells Fargo stated that it was driven to file the petition because for the first time the trust would experience losses that would necessarily affect the junior note-holder, and it was required to determine which note, which class of note was more senior and more junior in order properly to allocate losses.

(Continued on next page)

THE COURT: Wells Fargo gave notice of the petition to all affected note holders. Scepter intervened and then promptly removed the case to the United States District Court for the district of Minnesota. Semper intervened as a party in interest. All parties stipulated that this action would be transferred to the United States District Court for the Southern District of New York, where unhappily I became the judge by random selection of the case.

Wells Fargo sent notices concerning this proceeding was dated January 27, February 20, March 14 and April 9, 2014, and all exhibits to this proceeding.

Wells Fargo asked the Court to instruct it how the indentureship should be interpreted and whether it should be reformed because of a mutual mistake. It did not argue in favor of either version. Semper argued that a trust instruction proceeding was improper, that the indenture could not be reformed and it favored an instruction in favor of its position.

It's the obligation of the Court to represent the interests of all parties in interest, even those not ascertained and not in being. I find that I have jurisdiction, that there is complete diversity between the plaintiff and all defendants, and that there is proper venue pursuant to a forum selection clause.

Since this is a diversity case, transferred to me from

the United States District Court for the District of Minnesota, I apply the law of the transferor court. As a matter of constitutional application, in the *Erie Thompson v. York* and *Klaxon v. Stentor*, the transferor court must apply the law of the State court, since this is an adversity case.

So I applied the law that would be applied in the United States District Court, the District of Minnesota, and the District of Minnesota applies the law of the State court in terms of substantive issues. For this purpose, tax limitations is considered substantive. However, under Minnesota choice-of-law rules, statutes of limitations are considered procedural unless a circumstance arises which requires them not to do so. The citations for these propositions will be in the findings and conclusions that are filed next week.

This dispute or conflict in choice of law, however, is a conflict without any meaning because, as I find and as I will soon develop, the law of Minnesota and the law of New York, which is the law that's supposed to govern under the forum selection clause and the choice-of-law clause in the parties' agreement in the indenture, come out to be the same.

Minnesota's trust instruction proceeding is a well-established procedure at which trustees can seek judicial guidance from a court about how to resolve different questions of judgment, and by giving notice to all affected parties, obtain a reliable and authoritative decision of the court,

authoritative on the trustee and authoritative on the parties affected.

The Restatement (Third) of Trusts, statement 71, described trust instruction proceedings as follows: "A trustee or beneficiary may apply to an appropriate court for instructions regarding the administration or distribution of a trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust proceedings."

Minnesota recognizes these proceedings under its statute law, section 501B.16, but the roots of such proceedings go back to equity, the Court's equity. Thus, a "petition for instructions gives the Court supervisory control over the trustee to protect the trustee when the meaning of the trust instrument is in doubt and to protect beneficiaries against the trustee's inefficiency, incompetency or neglect."

Under the Minnesota statutes, notice is provided for all affected beneficiaries. Affected beneficiaries may appear as interested parties. If they don't appear, they are, nevertheless, bound by the Court's determination.

Semper has moved to dismiss the action or portions of the action, as barred by New York's statute of limitations on actions based on reformation or mistake. The statute of limitations in New York on an action to reform a contract begins to run on the date when the mistake is made, not when it

was discovered.

Semper argues that the action is really an action for reformation based on mutual mistake and that a six-year statute of limitations governs. I found, however, that a trust instruction procedure, which this is and which it was labeled, may or may not encompass a reformation but revise its own statute of limitations to guide the parties.

Under both New York and Minnesota, statute of limitations are procedural, as I said before. Minnesota has a borrowing statute, based on the Uniform Conflict of Laws Limitations Act, codified in Minnesota statute Section 541.30. The borrowing statute applies to claims which are substantively based upon the law of one or more state other than Minnesota. If the claim is substantively based on the law of another state, here in New York, the limitation period of that other state applies. But where it's procedural, as Minnesota calls it, Minnesota applies its own statute of limitations.

The issue becomes complicated because if a strong policy exists as, for example, a policy to apply the intent of the parties expressed in an agreement, courts will sometimes forego the notion of applying its own procedural statute of limitations and look to the statute in an agreement. Here, pointing to New York.

But whether in New York or in Minnesota, I hold, the statute of limitations that would be applied will be that

applicable to a proceeding brought by a trustee to seek instructions how to interpret conflicting clauses in an instrument. If it's necessary in giving the answer or as a consequence of giving the answer to reform the document, that doesn't mean that the statute of limitations for a contract reformation necessarily applies because the statute that applies is determined by the nature of the cause of action. And the nature of the cause of action, whether in Minnesota or in New York is the common law notion of courts supervising trusts and giving guidance where a trustee lacks guidance in the application of law to an instrument.

A trust instruction proceeding, in its very nature, is not an adversary action. When Wells Fargo commenced this proceeding, it was the only party in the case and did not assert a right or claim to anything. Subject matter jurisdiction, which depends on an existing case or controversy, arose when Scepter LLC intervened as a party in interest because, at that point in time, as occurred in the removal proceeding that brought this action from a State court to the United States District Court in Minnesota, an adversary relationship was created between Scepter and the neutral Wells Fargo.

Scepter was arguing for a specific application. Wells Fargo was seeking instruction as between two competing applications. And the adversary nature of the proceeding was

confirmed and made clear when Semper also intervened because, at that point in time, a true and complete adversary relationship arose between Scepter and Semper.

Now, I will acknowledge that subject matter jurisdiction attaches at the outset of a proceeding, and were this a question that was put to the United States District Court in Minnesota or to me before the parties intervened, I might have felt differently about subject matter jurisdiction. But when the case came to me, it was fully adversary; and second, there was a compelling need, because of the need to effect distributions, for the trustee to obtain guidance and to act on the guidance.

It was necessary to quiet the markets and to apply an authoritative rule to govern the trust allocation. Otherwise, there would be irreparable damage to the trustee and to all the investors. The job of sorting out who was entitled to what, after a distribution was made, when there could be additional sales hypothecations and other kinds of disposals of various kinds of investments would have created havoc for all the investors. From a practical point of view, this Court has subject matter jurisdiction.

In researching the law of the statute of limitations, I found no case, neither in Minnesota nor New York, which applied a statute of limitations to a trust instruction proceeding. Semper argued that there was one in Minnesota in a

case called *In re: Trusteeship of Trust Created Under Trust Agreement Dated December 31, 1974*, reported at 674 N.W.2d 222, (Min. Ct. App. 2004).

In that case, the Minnesota Court of Appeals applied a statute of limitations to a trust instruction proceeding, but that case was a case that had to determine the paternity of children. The Minnesota Parentage Act created a presumption that a husband is the biological father of a child born to his wife, and provides that the presumption could be rebutted only before the child reached three years of age.

The Minnesota Court of Appeals held that the trust instruction proceeding would be governed by this irrebuttable presumption because the children at issue were older than three. The statute of limitations was one dealing with contests of paternity, which is governed by a different rule from the law governing instructions to trustees and one where the importance of settling paternity is crucial. The statute is in a different part of the statute book, it's codified in a different way, and it doesn't apply to a proceeding of the nature we have here.

The trust instruction proceedings are not proceedings to give general advice to trustees. A trust instruction proceeding can be brought only when a trustee is confronted with an actual, concrete problem. It cannot be brought before that.

This case could not have been brought before the allocation of losses that would be necessarily affected, whether a class 1-A-3 note holder or a class 1-A-2 note holder would suffer the application of a loss. That occurred, as I understand it, now, in 2014. It was not until 2011, 2012 that the trustee was even aware of the contradiction between the offering documents and the trust indenture.

So since the action could be brought only currently, there has been no running of a statute of limitations. Even the customary six-year statute that applies to actions on the contracts or, as in New York, where there is no other cause of action.

The accrual date is crucial, and the accrual date is one when the real case or controversy applies. And certainly, the trustee could not have brought it before it was brought home to him by the Moody's disclosure and by inquiries from various note holders, which occurred in 2011 and 2012, that there was a contradiction which required a special application as to one class or another.

I conclude that Minnesota courts would follow the statement rule that a party can begin a trust instruction proceeding only when faced with a concrete problem. The language is as follows, and it's from section 71, Restatement (Third) of Trusts:

"Because of concern regarding burdens on the judicial

system and unwarranted costs and delays in the trust administration, a trustee or beneficiary normally is not entitled to instructions with respect to the administration of a trust unless there is some reasonable doubt about the extent of the trustee's powers or duties or about proper interpretation of the trust provisions.

"Nor will the Court instruct the trustee as to a question that may never arise, or that may arise only in the future, unless some need is shown for current resolution of the matter. Thus, a court ordinarily will not instruct a trustee on the distribution of trust property before the time arrives for making, or at least planning, that distribution."

That makes this action timely under Minnesota. The situation is the same, as I said before, in New York. A trust instruction proceeding in New York would have been brought as a special proceeding under CPLR article 77. There is no specific statute of limitations for trust instruction proceedings under the article 2 of the CPLR, the governing statutes of limitations. A six-year statute of limitations is provided for action based on contracts or actions for which no other limitation is specifically prescribed by law. That's CPLR 213.

New York statute of limitations begins to run when the causes of action accrues, and that's provided by CPLR section 203(a). A cause of action accrues when a party can first bring suit. That occurred when there was something real about the

allocation, not something far off in the future, and it makes the action current when it was brought.

I, therefore, hold that the proceedings timely under both New York and Minnesota law. I deny the motion to dismiss based on statutes of limitations.

There are various equitable defenses that Semper advances. None of them has merit. There was no laches. There was no delay in bringing the lawsuit. There was a period of time where Wells Fargo considered the possibility of amendment and thought through what it could do, but there was no prejudice to anyone's interest. If Semper wanted to get out or if Scepter wanted to get out of its investment, it could have done so at a profit, maybe not full profit that it would have liked, but a profit. And there was no laches.

There was no equitable estoppel because there was no assertion of a position, which the party had to reverse. It's true that the trustee proceeded under the indenture, rather than the conflicting disclosure statements in the offering documents, but when the contradiction was pointed out to it, the trustee ultimately was asked to resolve the issue, could not resolve the issue and brought the lawsuit. That does not make out an estoppel.

And there was no unclean hands nor unjust enrichment. Both parties, Scepter and Semper, bought on their own analyses of the upside and the downside of the various interpretations

and took the risk of what occurred.

As I indicated before, these documents are contradictory. It's clear to me that the intent manifested by the indenture could not have been the intent of the parties. If it had been the intent of the parties, materially different from the intent that was displayed in the offering documents distributed to the public, it would have required an amendment that would be publicly disclosed presumably in the supplement to the prospectus.

The fact that there was no change in the supplement prospectus indicates that the parties contemplated the intent disclosed in the offering documents was the operative intent. Without an amendment to conform to the indenture, assuming that the indenture accurately reflected the intent of the parties, there would have been a material misrepresentation of fact in violation of section 10b of the Securities Exchange Act and like provisions of the Trust Indenture Act.

Only if one proceeds in the realization that there was a scrivener's error with regard to the trust indenture, does this case make sense, and that is consistent with the nomenclature, with the coupons, with the way that security is enhanced and all other features of these notes.

I construe the suite of documents that has been used, not just the trust indenture, and I hold that the trust indenture must be reformed so that the intent it describes is

consistent with the intent of the parties in creating this suite of documents that was disclosed to the public and that no one is hurt by this because all investors were aware of the discrepancy.

Semper argues that a decision of the United States District Court for the Central District of California holds that investors who rely on an indenture, standing alone, cannot be disturbed from their reasonable expectations. The case is *Citigroup Global Markets, Inc. v. Impac Secured Assets Corp.*, 11 Civ. 4514 (C.D. Cal. May 3, 2012).

That case was an action of the Federal Securities Law. Plaintiff had bought securities based on its reading of a publicly filed pooling and services agreement or trust indenture. The problem was that the defendant had publicly filed an inaccurate version of the pooling and services agreement. As a defense to an action against it, the defendant argued that it was unreasonable for the plaintiff to have relied on an inaccurate version of the PSA because the offering documents gave different information.

The court rejected this argument, concluding that it was irrelevant under the Federal Securities Law whether the plaintiffs' reliance on the incorrect PSA was reasonable. The court stated that, in any event, the plaintiffs' reliance on an incorrect PSA was reasonable, even though the PSA conflicted with the offering documents, it superseded. The court stated

that the differences between a PSA and a prospectus supplement are not conflicts because the document are clear that any such differences redound in favor of the PSA. And there is a similar clause in the prospectus in this case.

But even assuming that the California court was correct in its interpretation of the securities laws, and even assuming that it also expressed New York law, Semper's argument about articulating a rule describing how a suite of documents should be construed is not something I would follow. The purpose of reformation in connection with a suite of documents is to create or cause consistency to override inconsistency.

It's not tolerable in a disclosure regime for important disclosure documents, like prospectuses and term sheets and private placement memoranda, to be inconsistent with even a fundamental contract like an indenture. If an indenture overrode that which was disclosed to the public, as I pointed out before, a material undisclosed change is made in the offering documents, creating the opportunity for discrepancy among buyers, favoring some and prejudicing others. The basis of the security laws is to create consistency, so that all investors are on an equal footing.

If Citigroup Global Markets is interpreted to allow inconsistencies of this nature, other than the special point of reliance in terms of a defendant, it creates the potential for inequality and creates potential for liability where there

should be none.

We did not have a case where reasonable expectations of a good-faith purchase of a value has to be protected. As I held, Peresechensky was aware of the risks, depending on the interpretation to be favored either of the indenture or of the offering documents. He made an investment decision based on his analysis of upside and downside.

Neither am I persuaded that another investor might be favored and another investor lose out. What I have to do is the right thing, and that is to create a consistency with a clear intent, clear intent to have consistency.

Accordingly, the trustee is instructed to apply loss allocation as disclosed in the term sheet, the prospectus and the private offering memorandum. The indenture will be reformed to carry out the change that should have been made at 1:11 a.m. on January 21, I think, 2005, and thereby create consistency among all the operating documents.

These expressions are not final. The final version will be that which is filed, presumably, this week.

Now, I note that there are various counterclaims and cross-claims, which for the purpose of obtaining a speedy resolution that was needed in this case, we left for another date. I have a strong feeling that the decision I delivered today, and which will be solidified with the final papers to be filed later, will make these counterclaims and cross-claims

academic.

I think the parties probably need finality because one or the other might wish to appeal. They won't be able to appeal as long as the counterclaims and cross-claims are here. So I'm wondering how we should proceed. Mr. Rollin? If you haven't thought about it and want time to think about it, I wouldn't mind that.

MR. ROLLIN: No, I think that's right, your Honor. I think we need some time to think about it, particularly after we see your Honor's final rulings and any post-judgment considerations we may have.

THE COURT: What's your time pressure, Mr. Johnson?

MR. JOHNSON: Your Honor, we do not yet know how this month is turning out, but we suspect that the losses will not hit these classes this month. It is possible they will hit in August. So, you know, ideally, we would like to have resolution of this within the next 30 days.

THE COURT: I can do that. So what I will do is when I issue the findings and conclusions, I have a last paragraph called first status conference, and at that time, we'll figure out how we approach the rest of the case. And that status conference will be a week or so after the decision. Will that be satisfactory?

MR. ROLLIN: Yes, your Honor.

THE COURT: Have I missed anything? Do I need to make

any more rulings? I want to thank you again for an excellently presented case.

MR. PICKHARDT: Thank you, your Honor.

MR. ROLLIN: Thank you, your Honor.

MR. JOHNSON: Thank you, your Honor.

(Adjourned)